STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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In the Matter of the Proceeding
Pursuant to Section 44, subdivision 4,
of the Judiciary Law in Relation to

RICHARD L. GUMO,

a Justice of the Delhi Town Court and
an Acting Justice of the Walton Village
Court, Delaware County.

DETERMINATION

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THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Jodie Corngold
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

Robert H. Tembeckjian (Edward Lindner and Thea Hoeth, Of Counsel)
for the Commission

Honorable Richard L. Gumo, *pro se*

The respondent, Richard L. Gumo, a Justice of the Delhi Town Court and an Acting Justice of the Walton Village Court, Delaware County, was served with a Formal Written Complaint dated August 28, 2013, containing one charge. The Formal

Written Complaint alleged that respondent: (i) presided over a Disorderly Conduct case without disqualifying himself or disclosing that a key prosecution witness was the daughter of the court clerk; (ii) permitted the court clerk to perform clerical duties in connection with the case and to be in the courtroom during the trial; and (iii) after convicting and sentencing the defendant, sent a letter to the County Court Judge hearing the appeal that contained legal arguments and facts outside the record. Respondent filed a verified answer dated September 9, 2013.

By Order dated November 1, 2013, the Commission designated David M. Garber, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on February 12, 2014, in Albany. The referee filed a report dated June 23, 2014, and a supplemental report dated June 30, 2014.

The parties submitted briefs with respect to the referee's report and the issue of sanctions. Commission counsel recommended the sanction of admonition, and respondent recommended dismissal of the charge.

On September 18, 2014, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a Justice of the Delhi Town Court, Delaware County, since 2007 and has served as Acting Justice of the Walton Village Court since 2009. Respondent is an attorney and was admitted to the practice of law in New York in 1967.

2. On July 22, 2010, Walton Village Justice Paul Laauser issued a summons charging Jeanie Groat with Disorderly Conduct, a violation under Penal Law Section 240.20. The summons was based on an Information executed by Jeannette Moser-Orr, with a supporting deposition by Diana Parulski, alleging that on July 17, 2010, Ms. Groat, "with the intent to cause public inconvenience, annoyance or alarm, ... did use abusive or obscene language" at the Delaware County Fairgrounds by shouting, among other things, that she would "come after [Ms. Moser-Orr's] fucking job." The alleged incident occurred after Ms. Moser-Orr, who was in charge of a horse show, had refused to permit Ms. Groat's daughter to re-run the course after she was disqualified. After arraigning the defendant on August 5, 2010, Judge Laauser recused himself because of his son's employment in the Village police department, and the case was assigned to respondent.

3. Assistant District Attorney ("ADA") Marybeth Dumont obtained additional supporting depositions from several witnesses, including Colleen Beers. Ms. Beers' deposition dated October 21, 2010, states that Ms. Groat approached Ms. Moser-Orr, used profanities and said that she would have Ms. Moser-Orr fired.

4. Colleen Beers, who was 14 years old at that time, is the daughter of Kristin Beers, the sole clerk of the Walton Village Court. Respondent and Kristin Beers work together three to four hours each week, share an office and have a professional, friendly relationship.

5. On November 17, 2010, ADA Dumont offered to resolve the Disorderly Conduct charge with an Adjournment in Contemplation of Dismissal

("ACD"). The defendant rejected the offer. On December 9, 2010, respondent denied the defendant's motion to dismiss the Information for facial insufficiency.

6. Before presiding over the *Groat* case, respondent reviewed the file, including Colleen Beers' supporting deposition, and thus had reason to know prior to trial that Colleen was a potential witness. Respondent did not disclose, either before or during the trial, that Colleen was the daughter of the court clerk; nor did respondent disqualify himself or inquire of the defendant, her attorney or the prosecutor whether they objected to respondent's presiding in the matter.

7. Respondent testified that at the time he handled the *Groat* case, he believed that since his disqualification was not mandated by Judiciary Law Section 14[1] he was not required either to disqualify himself or to disclose that a witness was the daughter of the court clerk. He also believed that the principal witnesses were Ms. Moser-Orr and Diana Parulski.

8. Prior to the trial, neither the defendant nor her attorney, David P. Lapinel, Esq., was aware that Colleen Beers was the daughter of the Walton Village Court clerk. ADA Dumont knew of the relationship and believed that Mr. Lapinel also was aware of it because, as she later told the County Court, "there was an assumption everybody knew everybody." Respondent did not know whether Mr. Lapinel or ADA

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[1] Judiciary Law Section14 ("Disqualification of judge by reason of interest or consanguinity") provides in pertinent part: "A judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree."

Dumont was aware of the relationship since the issue was never mentioned in his presence until the sentencing proceeding in October 2011.

9. At the bench trial on February 10, 2011, five witnesses testified for the prosecution. Kim Sanford, the announcer for the horse show, testified that prior to the competition, Ms. Groat appeared to be annoyed with Ms. Moser-Orr. Roger Parulski, the horse show judge, testified that after he disqualified Ms. Groat's daughter and told her she could talk to Ms. Moser-Orr, he heard "raised voice[s]" and "screaming" from the secretary's stand, a work area for the show's staff. Diana Parulski testified that, while sitting in her car about 30 feet away, she saw two women (who she subsequently learned were Ms. Groat and Ms. Moser-Orr) in the area; Ms. Groat was "in a rage" and told Ms. Moser-Orr several times in a loud voice that drew the attention of several people in the vicinity that she would "call her boss" and would "have her lose her job"; she testified that Ms. Groat had "a very aggressive stance" that "was beyond anger to where I was fearful for the other person."

10. Colleen Beers testified that while handing out ribbons near the secretary's stand, she saw and heard the incident from about 15 feet away. She testified that after Ms. Moser-Orr refused to permit Ms. Groat's daughter to re-run the course, Ms. Groat yelled at Ms. Moser-Orr that "she was going to take her job," using the words "frickin'" and "fucking" multiple times.

11. Ms. Moser-Orr testified that when she denied Ms. Groat's request to permit her daughter to re-run the course, Ms. Groat became angry and shouted, "I'm coming after you. I'm coming after your fuckin' job. I'm going to ruin you. I'm calling

your boss"; she testified that Ms. Groat clenched her fist and was so angry and agitated that she (Ms. Moser-Orr) thought Ms. Groat was about to hit her.

12. The defendant acknowledged that during the incident she was angry and loud. She testified that she told Ms. Moser-Orr that she would "take it to [her] boss" and "was going to go over her head to the State and to the County and talk to them about what had happened." She testified that she did not remember using profanity and stated, "I didn't know freaking was a swear." At the conclusion of the trial, respondent reserved decision and scheduled written closing statements.

13. Despite knowing that the court clerk's daughter was a likely witness in the case, respondent did not insulate the court clerk from the case and permitted her to perform her customary clerical and administrative duties in connection with the matter. These duties included making notations in court records (including the date of receipt on documents and the chronology of events on the docket) and sending a scheduling notice on which she signed respondent's name. When the court received her daughter's deposition, she noted the receipt in the file, placed a copy in the file and distributed copies to the attorneys.

14. Although the court clerk typically stayed in her office during trials, she entered the courtroom for her daughter's testimony, sat in the back of the courtroom and remained for the rest of the trial. At the Commission hearing, respondent testified that he did not see the court clerk in the courtroom, but he acknowledged that he did not instruct her not to be there.

15. Shortly after the trial, Ms. Groat told her attorney that a friend had

informed her that Colleen Beers was the court clerk's daughter. Mr. Lapinel did not raise the issue in his written summation submitted on March 17, 2011, although he was then aware of the relationship.

16. On March 16, 2011, Mr. Lapinel sent respondent a letter stating that during a break in the trial the defendant had observed a possible communication between Ms. Moser-Orr, who had not yet testified, and her husband, who had been in the courtroom, which would have violated respondent's order excluding prospective witnesses from the courtroom. Respondent held a post-trial hearing on April 20, 2011, and determined that there was no proof of an improper communication between the Orrs. At the hearing, Mr. Lapinel did not raise the issue of Colleen Beers' relationship to the court clerk. Mr. Lapinel testified at the Commission hearing that he did not raise the issue because he expected his client to be acquitted.

17. On April 25, 2011, respondent issued a decision convicting the defendant of Disorderly Conduct. Respondent's decision referred (though not by name) to Colleen's testimony that she saw and heard the confrontation and that, while shouting with "rais[ed]…hands in the air," the defendant "used foul language and used the 'F' word on multiple occasions." Respondent found that the defendant's conduct "reached the point of a potential and immediate public problem."

18. On June 9, 2011, the defendant appeared before respondent for sentencing. The prosecutor recommended a conditional discharge. Respondent indicated that he believed that the defendant had lied during the trial and shown a "flagrant disregard for the truth," and he announced his intention to sentence her to jail.

Respondent granted Mr. Lapinel's request for an adjournment in order to provide character references.

19. At the sentencing proceeding on October 26, 2011, Mr. Lapinel argued that the defendant had no criminal history and a jail sentence would be inappropriate. For the first time, Mr. Lapinel argued that respondent should have disclosed the relationship between Colleen Beers and the court clerk. He stated that he intended to make a motion to vacate the conviction and to raise the issue on appeal.

20. Respondent sentenced the defendant to 15 days in jail, a $250 fine and mandatory surcharges of $125, the maximum sentence for Disorderly Conduct. He stayed execution of the sentence for one day to allow Mr. Lapinel to apply for a stay.

21. Later that day, in County Court, Mr. Lapinel filed papers for an Order to Show Cause staying the sentence pending a post-conviction motion and appeal. Mr. Lapinel's papers cited respondent's failure to disclose the relationship between Colleen Beers and the court clerk. The Order was granted, returnable before County Court Judge Carl F. Becker. On October 31, 2011, Judge Becker held a hearing on the application and granted an oral stay pending the appeal. Judge Becker stated:

> "I'm particularly troubled by this allegation that one of the prosecution's witnesses was a daughter of the clerk...Had that been known, that would have been a no-brainer for a change of venue...Under the circumstances, I've got to stay this pending appeal, so the motion's granted for the stay pending appeal... [M]y reason for that is that if these facts had been apparent on the record and were known to counsel prior to trial, a motion for a change in venue would have been granted, so I'll stay this pending appeal."

22. Respondent learned of Judge Becker's stay and comments from

newspaper articles. He was offended and embarrassed by Judge Becker's "no-brainer" comment, which he thought made him "look like a complete dunce" and "impugned the integrity" of his court.

23. On or about November 25, 2011, Mr. Lapinel made a motion to vacate the conviction and sentence pursuant to Criminal Procedure Law Section 440.10, citing among various grounds respondent's failure to disclose the relationship between Colleen Beers and the court clerk. On January 7, 2012, respondent dismissed the motion on the ground that Mr. Lapinel had failed to furnish the prosecutor with the trial transcript, thereby precluding her from responding to the motion. On March 26, 2012, Judge Becker denied the defendant's motion for leave to appeal the dismissal of the motion.

24. On April 27, 2012, respondent issued an order directing the defendant to surrender on May 7, 2012, for execution of the sentence. In two letters faxed to the court on May 3, 2012, Mr. Lapinel advised respondent that he had submitted a proposed order to Judge Becker embodying his oral order granting a stay and that the October 26, 2011, stay order remained in effect pending the determination of the appeal. By letter dated May 3, 2012, respondent told Mr. Lapinel that the stay order had lapsed since the appeal had not been perfected within 120 days and that the defendant must appear for sentence as ordered. On the same date, Judge Becker executed an order staying execution of the sentence "until the determination of any motions or appellate review of the proceedings is exhausted."

25. On May 7, 2012, respondent mailed, faxed and hand delivered a

two-page letter to Judge Becker concerning *People v. Groat*. Respondent's letter contained legal argument and facts not in the record that pertained to the disqualification issue or were otherwise grounds for affirming the conviction and sentence, as follows:

(A) Respondent's letter stated that the County Court had not been provided with certain information, including that the ADA had provided Mr. Lapinel with a list of witnesses and their supporting depositions "*several* months before the actual trial"; that the court clerk's daughter "was one of *several* witnesses who testified," had competed with the defendant's daughter "in many 4H competitions," and both were from the Village of Walton and had attended the same school; that the defendant "**NEVER RAISED**" the issue of the relationship between the court clerk and a witness until after the conviction; that the court clerk was not a witness and was not present "when the alleged criminal activity occurred"; that the defendant had rejected the offer of an ACD and "insisted on going to trial"; that the defendant had presented "not one scintilla of evidence" at the post-trial hearing to prove her "alleged claims of wrong doing"; and that the defendant to date had not provided a transcript of the post-trial hearing. (Emphasis in original.)

(B) Respondent's letter stated that the defendant's appeal "was time barred" by Criminal Procedure Law Section 460.50(4) since the appeal was not argued or submitted within 120 days of the original stay, and respondent did "not know of any good cause Defendant presented" to extend the time to perfect the appeal.

(C) Respondent's letter also addressed Judge Becker's "no-brainer" comment, stating:

> "I understand your ruling to mean that *anytime* a Village employee or relative thereof, is a witness in a criminal proceeding, (i.e., Village Police officer, Village dog warden, Village Code enforcement officer and their relatives) is an eye witness to a criminal proceeding and will testify at trial, the Village/Town Court is obligated *on it's* [sic] *own motion, must* automatically request you to transfer jurisdiction based upon such employment relationship." (Emphasis in original.)

26. Respondent testified that he sent the May 7th letter to Judge Becker, who was also his administrative judge, pursuant to his judicial responsibility to have the defendant surrender for sentence and his ethical obligation to take "appropriate action" with respect to misconduct by a lawyer (*see* 22 NYCRR §100.3[D][2]). Respondent, who maintains that the defendant's attorney had "intentionally misled" the County Court and had "lied" in denying that he knew of the witness' relationship to the court clerk, did not file a complaint against the attorney with the Committee on Professional Standards. At the oral argument, respondent indicated that he believed that his letter was appropriate, "if not expressed in the greatest of terms," but he acknowledged that he should not have advised the County Court Judge that the defendant had rejected a plea offer.

27. On May 11, 2012, Judge Becker sent respondent's letter to the Commission. Thereafter, he disqualified himself in *People v. Groat*.

28. On April 9, 2013, Acting County Court Judge John F. Lambert dismissed the appeal in *People v. Groat*. In his decision, Judge Lambert rejected the defendant's argument that since a witness' mother was the court clerk, "the Court should have changed the venue *sua sponte*." Citing *People v. Moreno*, 70 NY2d 403 (1987), the

decision stated that since there was no legal disqualification under Judiciary Law Section 14, "a trial judge is the sole arbiter of recusal" whose recusal decision "may not be overturned unless it was an abuse of discretion." On September 28, 2013, the Court of Appeals denied the defendant's motion for leave to appeal.

29. Ms. Groat served nine days of her 15-day jail sentence in the Delaware County Correctional Facility.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1 and 100.2(A) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained insofar as it is consistent with the above findings and conclusions, and respondent's misconduct is established.

Respondent showed insensitivity to his ethical obligations by failing to disclose that a material witness in a case over which he presided was the daughter of the court clerk, by failing to insulate the court clerk from the case, and by sending an inappropriate letter about the case after the conviction to the County Court Judge before whom the matter was then pending. In so doing, respondent did not act in a manner that promotes public confidence in the integrity and impartiality of the judiciary, as required by the ethical standards (Rules, §100.2[A]).

Most troubling, in our view, is respondent's unauthorized letter to the

County Court Judge who had issued a stay of the sentence and who, respondent believed, would hear the post-conviction motions and appeal in *People v. Groat*. In apparent chagrin that the defendant's attorney had raised the disqualification issue and that the County Court Judge had stayed the sentence and extended the time to perfect the appeal, respondent mailed, faxed *and* hand delivered the letter to the County Court, underscoring his insistence to be heard on those issues. Instead of allowing the attorneys to address the merits of those matters, respondent – at a time when his proper role in the case had concluded – abandoned his role as a neutral arbiter and became an advocate. Advising the County Court Judge of numerous facts relating to the disqualification issue that the defendant's attorney had "not provided" (and that respondent has admitted were outside the record) was impermissible advocacy before the court that would consider the matter. Respondent's argument that the appeal was "time barred" and that he knew of no "good cause" for extending the defendant's time to perfect the appeal was also that of an advocate. Such conduct is inconsistent with well-established ethical principles. *See Matter of Van Woeart*, 2013 NYSCJC Annual Report 316 (improper for a recused judge to write to the transferee court expressing her biased opinion as to the matter and advising the court of jurisdictional defects in the transferred cases and facts not contained in the court files); *see also* Opinion 98-77 of the Advisory Committee on Judicial Ethics ("Advisory Committee") (improper for judge to write to the Appellate Division advancing arguments on behalf of a party whose interests were adversely affected by an appellate decision reversing the judge's ruling, since "a judge should not adopt the role of an advocate").

Notwithstanding that respondent's letter was copied to the attorneys in the case, the letter was ethically and procedurally improper. We reject respondent's argument that the letter was consistent with a judge's professional responsibilities. The tenor of his letter, which ranges from self-serving advocacy to sarcasm (in addressing the County Court Judge's "no-brainer" comment"), strongly suggests that respondent acted in a fit of pique, not in a principled exercise of his ethical and judicial duties. If respondent believed that the defendant's attorney had engaged in misconduct, filing a complaint with the disciplinary committee would have been far more appropriate than writing to the court with jurisdiction over the case, citing facts outside the record and addressing pending legal issues.

With respect to the remaining allegations, we do not find that in the circumstances presented, respondent's disqualification in *People v. Groat* was mandated by Section 100.3(E)(1) of the Rules, but we conclude that respondent should have disclosed the court clerk's relationship to a potential witness in order to give the parties the opportunity to be heard on the issue before proceeding.

The ethical standards provide that a judge must disqualify "in a proceeding in which the judge's impartiality might reasonably be questioned" (Rules, §100.3[E][1]). Having reviewed the court file and supporting depositions prior to presiding in *People v. Groat*, respondent knew that the daughter of the court clerk was a potential witness, as an eyewitness to the events underlying the charge. Even if he could not be certain before the trial that she would be called as a witness or of the relative value of her testimony, respondent was on notice that she was a potential significant witness and thus had an

opportunity to consider whether his disqualification or at least disclosure of the witness' relationship to the court clerk was required.

In many situations, the decision whether to disqualify is solely within the personal conscience and sound discretion of a judge, guided by the ethical considerations as interpreted by the decisions of the Court of Appeals and the Commission and the opinions of the Advisory Committee. Although we recognize that respondent and the clerk of the court where he serves as Acting Justice have regular contact and a professional, friendly relationship, in our view the particular facts presented here did not require the judge's disqualification. While the court clerk's daughter was a witness (one of several) to the underlying events at issue, the record before us does not suggest that either the court clerk or her daughter had any particular relationship to, or any bias towards or against, the defendant or complaining witness, or any personal interest in the outcome of the matter. *Compare*, *e.g.*, *Matter of George*, 22 NY3d 323 (2013) (involving a Seat Belt charge against a defendant who was the judge's long-time friend and former employer); *Matter of Intemann*, 73 NY2d 580 (1989) (involving numerous matters brought by an attorney who was the judge's friend, business associate and personal attorney); *see also Matter of Merkel*, 1989 NYSCJC Annual Report 111 (in a case involving a Bad Check charge where the court clerk was the complaining witness, the ethical standards required disclosure but not recusal). In those attenuated circumstances, since respondent believed that he could be fair and impartial in weighing the witness' testimony, the relationship of the witness to the court clerk was not, in our view, a reasonable basis to require the judge's disqualification.

While finding no misconduct in this respect, we reject respondent's argument that since his judgment was affirmed by the County Court, his decision not to disqualify himself cannot constitute misconduct. The County Court, citing *People v. Moreno*, 70 NY2d 403, 405 (1987), had held that absent a mandatory legal disqualification under Judiciary Law Section 14 "a trial judge is the sole arbiter of recusal" whose recusal decision may not be overturned unless it was an abuse of discretion. The "abuse of discretion" standard for reversing a judge's decision is different from the standard for finding an ethical violation. *See People v. Saunders*, 301 AD2d 869, 872 (3d Dept 2003) ("While it may be argued that [the judge] should have recused himself to avoid any appearance of partiality [*see* 22 NYCRR 100.3(E)(1)(b)(iii)], such an error, if indeed there was one, does not warrant reversal and a new trial under the circumstances of this case"); *People v Reiman*, 144 AD2d 100, 111-12 (3d Dept 1988) ("Although ethical standards require avoidance of even the appearance of impropriety [*see*, Code of Judicial Conduct Canons 2[A]; 3[C][1][a]; 22 NYCRR 100.2[a]; 100.3[c][1][i]; *see also, Corradino v Corradino*, 48 NY2d 894, 895], an ethical violation, if indeed there was one, does not necessarily warrant reversal and a new trial [*Matter of Martello*, 77 AD2d 722] and certainly does not in this case"); *In re Martello*, 77 AD2d 722 (3d Dept 1980) ("while the Trial Judge may have been guilty of an impropriety in not disqualifying himself, we do not feel that it is of sufficient consequence to warrant reversal and a new trial"). As we recently stated in finding misconduct where a judge presided over matters involving a lawyer who was her close friend and her personal attorney, another who was her former attorney, and a lawyer who

was or had been her campaign manager (relationships that did not require recusal under the statute):

> "Notwithstanding the dictum in *Moreno* that a judge 'is the sole arbiter of recusal' absent a legal disqualification mandated by Judiciary Law §14 (id. at 405), the Court of Appeals, in numerous disciplinary cases in the 26 years since *Moreno*, has found misconduct for failing to disqualify under the general ethical standard in Rule 100.3(E)(1) ('impartiality might reasonably be questioned') and/or Rule 100.2(A) (the appearance of impropriety) notwithstanding that the judge believed he or she could be impartial. When a judge's failure to disqualify is inconsistent with clear standards established by case law and ethical guidelines interpreting Rule 100.3(E)(1), a finding of misconduct is appropriate."

Matter of Doyle, 2014 NYSCJC Annual Report 92, 112 (footnote with citations to disciplinary cases omitted), *removal accepted*, 23 NY3d 656 (2014).

Nevertheless, although we have concluded that the circumstances presented here did not require respondent's disqualification, we conclude that respondent engaged in misconduct by failing to disclose the relationship of the witness to the court clerk in order to provide an opportunity for the parties to be heard on the issue. *See Matter of Merkel, supra*. By failing to do so, he created an appearance of impropriety and acted in a manner that was inconsistent with his obligation to maintain high standards of conduct so as to promote public confidence in the integrity of the judiciary (Rules, §§100.1, 100.2[A]).

While there is no specific disclosure requirement in the ethical rules (except for remittal of disqualification), the Court of Appeals has inferred a disclosure requirement in certain situations based on the obligation to avoid an appearance of impropriety. *See Matter of Roberts*, 91 NY2d 93, 96 (1997) (stating, as to a judge who

sat on his dentist's case, "we note particularly the serious failure to inform a litigant of a potential basis for recusal...which evokes an impermissible appearance of impropriety"); *see also, e.g., Matter of Young*, 19 NY3d 621, 626 (2012) ("petitioner neither disqualified himself nor disclosed his relationship to the defendant or complaining witness"); *Matter of LaBombard*, 11 NY3d 294, 298 (2008) ("petitioner neither disqualified himself nor disclosed his relationship with defendant's mother to all interested parties"); *Matter of Assini*, 94 NY2d 26, 28 (1999) (judge permitted an attorney with whom he shared office space to appear before him "without ever disclosing their ongoing relationship in the record or inviting objections to his presiding"; *see also Matter of Doyle*, *supra*, 23 NY3d at 662 (even though remittal was not available, "there is no indication that petitioner made any attempt whatsoever at disclosure here").

Even if, as respondent asserts, he believed that the parties knew of the witness' relationship to the court clerk and even if the attorneys would not have raised an objection, it was his ethical duty to disclose the relationship on the record. Disclosure permits the parties to address the issue and bring to a judge's attention information or concerns that might influence the judge's decision on disqualification. In a small town, where, as the prosecutor stated, "there was an assumption everybody knew everybody," it was especially important to bring the issue into the open by addressing it in court, in order to dispel any appearance of impropriety and reaffirm the integrity and impartiality of the court.

Finally, we also believe that the court clerk's presence in the courtroom during her daughter's testimony and for the remainder of the trial, and the fact that the

clerk performed clerical duties in connection with the *Groat* case, compounded the appearance of impropriety (Rules, §100.2). "The purpose of such insulation is to avoid the conveyance of any impression that any person is 'in a special position to influence the judge.' 22 NYCRR 100.2(C)" (Advisory Committee Opinion 99-72 [requiring insulation in cases involving a court clerk's spouse who was a State Trooper]). Instead of ensuring that the clerk maintained a strict separation from the case, respondent took no steps to insulate her from the matter while it was pending. Even if such insulation may have presented an administrative burden since Ms. Beers was the sole clerk of the court, it is of paramount importance in every court proceeding to avoid even the appearance of impropriety. Indeed, the Advisory Committee has advised that if insulation of the court clerk is required but would be "impossible," the "only feasible course" is disqualification and transferring the case to another court (*Id.*). Had respondent disclosed the relationship as required and insulated the clerk from performing any duties in connection with the case, her presence in the courtroom would have been of lesser concern.

By reason of the foregoing, the Commission determines that the appropriate disposition is admonition.

Judge Klonick, Judge Ruderman, Judge Acosta, Mr. Belluck, Mr. Cohen, Ms. Corngold, Mr. Emery, Mr. Harding, Mr. Stoloff and Judge Weinstein concur, except as follows.

Mr. Belluck, Mr. Cohen, Mr. Stoloff and Judge Weinstein dissent only as to finding misconduct with respect to failing to insulate the court clerk from the case and

permitting her to be in the courtroom during the trial. Mr. Stoloff files an opinion, which Mr. Belluck, Mr. Cohen and Judge Weinstein join.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: December 30, 2014

Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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In the Matter of the Proceeding
Pursuant to Section 44, subdivision 4,
of the Judiciary Law in Relation to

RICHARD L. GUMO,

a Justice of the Delhi Town Court and
Acting Justice of the Walton Village
Court, Delaware County.

DISSENTING OPINION
BY MR. STOLOFF,
IN WHICH MR. BELLUCK,
MR. COHEN AND JUDGE
WEINSTEIN JOIN

– –X

The Rules of Judicial Conduct do not require perfection but are rules of reason.[1]

I dissent with respect to a finding of misconduct with respect to Charge I, paragraph 6B, in which it is alleged that Acting Village Justice Richard L. Gumo failed to act in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary in permitting the court clerk to be present in the courtroom

[1] As set forth in the Preamble to Part 100 of the Rules of the Chief Administrator of the Courts governing judicial conduct:

> "The rules governing judicial conduct are rules of reason. They should be applied consistently with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances.....
>
> * * * *
>
> Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transaction, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system."

during the trial in *People v. Groat*, including during her daughter's testimony, and to perform certain clerical duties in connection with this case. I agree that Judge Gumo should have disclosed the clerk's relationship to the witness, since the failure to do so deprived the parties of the opportunity to argue as to the proper measures the Court should have taken in light of that information.

I cannot conclude, however, that the clerk's performance of her normal clerical duties in the case and her presence in the courtroom during part of the trial violated the ethical canons under the particular circumstances here.

Court Clerk Kristin Beers was the sole clerk of the Walton Village Court. Had she been completely insulated from the *Groat* case, the judge himself would have been required to handle mail, perform scheduling and make routine notations in the court records, such as noting dates that papers were received or sent, that would have otherwise been made by the court clerk. I cannot conclude that a reasonable application of the ethical rules requires such a result under the circumstances here or that the judge's failure to do so compounds his misconduct.

Kristin Beers was not a court attorney or the judge's law clerk.

Advisory Opinion 10-150 provides that a judge need not disqualify himself when the court clerk appears as a witness pursuant to a subpoena to testify about a defendant providing proof of compliance with a condition of the sentence; the opinion does not address the issue of insulating the clerk from the case. Advisory Opinion 08-126 advises that where the spouse of a judge's law clerk or law secretary appears in the judge's court *as an attorney*, the judge need not disqualify but must insulate the law clerk

from the case (*see also* Adv Op 13-26, an opinion issued two years after the trial in *Groat*, extending that requirement to the spouse of a judge's secretary). Advisory Opinion 99-72, cited by the majority in support of requiring insulation (or disqualification if insulation is not feasible) involves a conflict where, on the facts presented, it appears the court clerk's spouse would be both the prosecutor and the principal prosecution witness (clerk's spouse is a State Trooper who appears in traffic cases in the judge's court). None of these Advisory Opinions would provide clear guidance to the judge under these circumstances, nor do any of the opinions indicate that the "insulated" staff member cannot sit with the spectators in the courtroom. *Matter of Merkel*, the only reported Commission case involving a conflict with court staff, makes no mention of an "insulation" requirement, and the Commission's Annual Reports have not addressed the subject.

We are thus presented here with a question of first impression. At the request of law enforcement, Colleen Beers (the daughter of Kristin Beers) signed a supporting deposition in connection with a Disorderly Conduct charge involving Jeanie Groat. Colleen Beers was one of five witnesses called to testify by the prosecutor. She was not the attorney (the situation addressed by the Advisory Opinions) or the complaining witness, and neither she nor the court clerk had any apparent personal relationship to the parties or attorneys.

I also note that Judge Gumo's contacts with the Walton Village Court Clerk were limited to a few hours a week as an Acting Village Justice of that court, whose primary judicial responsibilities were as the Town Justice of the Town of Delhi Town

Court, some 16 miles away.

It is undisputed that it was the general practice of the court clerk to remain in her office during trials. While Judge Gumo did not instruct her to remain in her office during the *Groat* trial, neither did he know or assume that she would not follow her usual practice and would enter the courtroom during her daughter's testimony, where she remained for the rest of the trial. He testified that his attention was focused on the witnesses who were testifying, not on the audience, and that he was unaware of the clerk's presence in the back of the courtroom. This fact is undisputed. A review of the transcript of the trial indicates that Judge Gumo did not interfere with the cross-examination by defense counsel of the witness Colleen Beers. He sustained objections made by both the prosecutor and defense counsel.

There is no evidence in the record before us that this is anything but an isolated incident. When Judge Gumo appeared for the oral argument, he confirmed that under similar circumstances in the future he would take steps to ensure the transgression complained of would not occur again.

Applying the rule of reason, it is my opinion that under these circumstances Charge I, paragraph 6B, does not rise to the level of misconduct. While hindsight may be 20/20 and Judge Gumo might have considered that the court clerk might depart from her normal practice to be in the courtroom for her daughter's testimony, in the circumstances presented here I cannot conclude that her presence in the courtroom was an ethical violation on his part. Recognizing the lack of prior decisional law or opinion by the Committee on Judicial Ethics addressing these issues, it is my opinion that the charge that

Judge Gumo failed to act in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary by permitting the court clerk to be present in the courtroom during the proceedings has not been substantiated.

Furthermore, recognizing that it was a small Village Court with only one court clerk, where Judge Gumo was the Acting Village Justice, it is also my opinion that one could not expect that, in addition to performing his other court duties, he would be required to undertake all the normal duties of the court clerk in connection with the *Groat* case because the clerk's daughter might be, and later was, a witness in the case. If the witness' mother had been his law assistant, I would agree that she should be separated from the case because a law assistant's analysis of the case could shape the opinion of the judge, which could affect the decision. As court clerk, her duties would not have the same effect on the judge's reasoning or decision, and prohibiting her from doing clerical work on the case or the records would serve no purpose. As Judge Gumo indicated, the court clerk had no involvement in drafting or even typing his written decisions after the trial.

For the foregoing reasons, I dissent from this portion of the majority's determination.

Dated: December 30, 2014

Richard A. Stoloff, Esq., Member
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